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Our File No.  
38110-100

September 9, 2022

**By ECF and E-mail**

The Honorable Lewis A. Kaplan  
United States District Judge  
Southern District of New York  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

**Re: Kleeberg, et al. v. Eber, et al.**  
**Docket No. 16-cv-9517 (LAK)**

Dear Judge Kaplan:

We represent Defendants in the above-referenced action.

We respectfully submit this letter, and the Declaration of Sumner T. Pearsall, CPA, dated September 9, 2022, and request that the Court issue the enclosed proposed order modifying the Order and Preliminary Injunction, dated October 14, 2021 to permit partial limited tax distributions from nominal Defendant Eber-Connecticut, LLC ("Eber-CT") to its members Eber Wine & Liquor Metro, Inc. ("Eber Metro"), Eder-Goodman, LLC (Eder-Goodman), and Wendy Eber.

The taxable income of Eber-CT, as a pass-through entity for tax purposes, is generally allocated on a pro rata basis to its members and its members are required to report their share of the LLC's taxable income on their own tax returns and pay their pro rata share of the taxes on Eber-CT's income, whether or not such allocated income is actually received by them. This general rule is subject to targeted allocations rules set forth in the Eber-CT LLC operating agreement. Eber-CT's LLC agreement also requires that the Company make annual cash distribution to its members in an amount equal to the LLC's taxable income multiplied by a blended tax rate for the members (as defined in Eber-CT's LLC operating agreement). The Order and Preliminary Injunction, dated October 14, 2021 ("10/14/21 Order"), precludes any distributions, including requested tax distributions, from Eber-CT to its members.

September 9, 2022

Page 2

At this point, however, Eber-CT's members have been allocated income for the 2020 tax year and the 2021 tax year and Eber-CT must make some distributions to enable its members to pay taxes due on allocated income. We thus seek relief from the 10/14/21 Order. The attached declaration of Sumner T. Pearsall, CPA, Eber-CT's and Eber Metro's tax preparer of approximately 15 years, sets forth the actual figures for tax distributions requested for Eber-CT's tax year 2021, with reference to Eber-CT's aggregate tax income and allocation of tax income.

### **I. 2020 Tax Year**

Eber-CT had allocable tax income for its 2020 tax year (6/1/20 through 5/31/21) in the amount certified by Mr. Pearsall in his declaration. Mr. Pearsall's declaration identifies the income allocable to Eber Metro. However, for its 2020 tax year, Eber Metro had no federal income tax due, as it had sufficient allowable net operating loss carry-forwards to offset all taxable income for its 2020 tax year.

Mr. Pearsall's declaration further certifies that Eder-Goodman had no allocable tax income from Eber-CT for its 2020 tax year under the terms of Eber-CT's LLC operating agreement.

Wendy Eber however did have allocable tax income for Eber-CT's 2020 tax year as certified by Mr. Pearsall in his declaration. Wendy Eber made federal and New York state income tax payments in the amount certified in respect of her share of Eber-CT's taxable income allocated to her. She did so even though she did not actually receive any tax distributions from Eber-CT in respect of Eber-CT's income allocated to her. These payments were made solely from her personal funds and not from Eber-CT's funds or the funds of any of the nominal defendants.

Eber-CT is not seeking to make a tax distribution for its 2020 tax year at this time, but it reserves the right to do so in the future.

### **II. 2021 Tax Year Estimate**

Eber-CT had tax income for the 2021 tax year (6/1/21 through 5/31/22) in the amount certified by Mr. Pearsall in his declaration. Mr. Pearsall has estimated that Eber Metro will owe an amount certified in Mr. Pearsall's declaration for federal income tax for the 2021 tax year. This tax payment is due on September 15, 2022.

Mr. Pearsall also estimates that Wendy Eber will owe federal and New York state tax payments based on the Company's taxable income allocated to her for the 2021 tax year in an amount certified in his declaration. Such tax is due on a quarterly basis, but there have been no tax distributions to Wendy to pay the quarterly estimated payments made in respect of this obligation for the 2021 tax year.

### **III. Proposed Order**

Notwithstanding Eber Metro's and Wendy Eber's tax liability, and the terms of Eber-CT's LLC agreement, no distributions have been made to the members for Eber-CT's tax years 2020 and 2021.

Enclosed please find a proposed order. The proposed order provides for an aggregate partial tax distribution for 2021 in an amount certified by Mr. Pearsall to the members pro rata in

September 9, 2022

Page 3

accordance with their membership interest in the Eber-CT. Notably, the proposed order provides that Eber Metro may only use the proceeds of such tax distributions to pay federal and New York state income tax, and that any distribution over that amount remains subject to the 10/14/21 Order. The proposed order references Mr. Pearsall declaration to preserve the confidential nature of these figures and we have requested sealing of his declaration.

We respectfully request that the Court issue the proposed order to permit tax distributions as outlined above and as specified in Mr. Pearsall's declaration. We note that we continue to have communications with Plaintiffs' counsel concerning a potential proposed order on consent, but given the upcoming tax deadline for Eber Metro we are submitting this application today.

Respectfully submitted,

*s/ Frank T. Santoro*

Frank T. Santoro

Enclosures

cc: All Counsel of Record (with enclosures)